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November 13, 2003

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TRA DOCKET ROOM

VIA HAND DELIVERY

Hon. Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Generic Docket to Establish UNE Prices for Line Sharing per FCC 99-355 and Riser Cable and Terminating Wire as Ordered in TRA Docket No. 98-00123*
Docket No. 00-00544

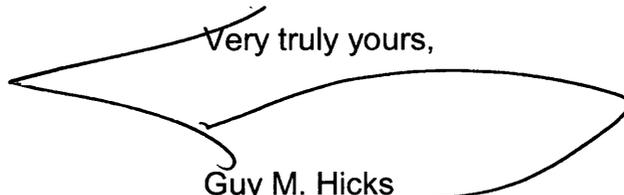
Dear Chairman Tate:

Enclosed are the original and thirteen copies of a *Motion to Vacate Order Regarding Dual Purpose Line Cards* filed by BellSouth, United Telephone Southeast, Sprint Communications Company, L.P. and Citizens Telecommunications Company of Tennessee, LLC. Covad, while not joining in this *Motion to Vacate*, does not object to an indefinite extension of the existing Stay.

The TRA has twice previously stayed the *Dual Purpose Line Card Order* in anticipation of the issuance of the Triennial Review Order ("TRO") and other factors. As explained in the *Motion*, the Stay will arguably expire on or about December 2, 2003, unless the TRA takes action to vacate the *Line Card Order* or extend the Stay. The parties recognize that the Authority and Staff are quite busy working on the TRO proceedings and many other matters. BellSouth, the Sprint Companies, and Citizens also support an indefinite extension of the stay if the Authority determines that it will not be in a position to rule on the *Motion to Vacate* prior to any expiration of the stay on December 2, 2003.

Copies of the enclosed are being provided to counsel of record.

Very truly yours,



Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Generic Docket to Establish UNE Prices for Line Sharing per FCC 99-355 and Riser Cable and Terminating Wire as Ordered in TRA Docket No. 98-00123*

Docket No. 00-00544

MOTION TO VACATE ORDER REGARDING
DUAL PURPOSE LINE CARDS

BellSouth Telecommunications, Inc. ("BellSouth"), United Telephone-Southeast and Sprint Communications Company, L.P. ("the Sprint Companies"), and Citizens Telecommunications Company of Tennessee, LLC ("Citizens") submit this *Motion to Vacate* the provisions of the Tennessee Regulatory Authority's ("TRA" or "Authority") *First Interim Order of April 13, 2002*, requiring the unbundling of certain Dual Purpose Line Cards (the "Line Card Order"). This *Motion* is based on the Federal Communications Commission's ("FCC") recent *Triennial Review Order* ("TRO"), as well as arguments previously submitted by BellSouth, the Sprint Companies and Citizens.

In the TRO, the FCC decided to exclude packet switching equipment and networks from ILEC's unbundling obligations. As explained below, the FCC has specifically determined that ILECs are not required to unbundle access to the electronics or other equipment, including dual purpose line cards, used to transmit packetized information. Accordingly, the TRO has squarely addressed – and eliminated – the arguments on which Covad sought an order requiring BellSouth and United Telephone-Southeast ("Sprint-United") to unbundle certain dual purpose line cards. The

relief Covad sought, and the *Line Card Order* to the extent it granted such relief, cannot be squared with the *TRO*.

The TRA has twice previously stayed the *Line Card Order* in anticipation of the issuance of the *TRO* and other factors. The Stay will arguably expire on or about December 2, 2003, unless the TRA takes action to vacate the *Line Card Order* or extend the Stay.¹ The parties recognize that the Authority and Staff are quite busy working on the *TRO* proceedings and many other matters. BellSouth, the Sprint Companies and Citizens also support an indefinite extension of the stay if the Authority determines that it will not be in a position to rule on the *Motion to Vacate* prior to any expiration of the stay on December 2, 2003.

Background

On April 3, 2002, the TRA issued its *First Interim Order* in generic docket proceedings before it to establish permanent unbundled network element ("UNE") prices for line sharing and permanent prices for unbundled riser cable and unbundled network terminating wire.² In that ruling, in addition to setting rates for numerous UNEs, the TRA ordered that BellSouth and Sprint-United: (1) install dual purpose line cards in their respective fiber-fed, next generation digital loop carrier ("NGDLC") equipment at remote terminals for use by competitive local exchange

¹ On June 27, 2002, the TRA stayed for six months its *First Interim Order* as to Issue 20, which was "Should the Authority require ILECs to install, for the CLECs' use, dual purpose line cards in the digital loop carrier System?" See pp. 4-7 of *Order on Petition for Stay and Requests for Reconsideration and Clarification* in Docket No. 00-00544. On April 1, 2003, the current TRA entered an *Order Granting Joint Motion to Extend Stay*. The TRA extended the stay until sixty days after the FCC took formal action as directed by the Court of Appeals for the D.C. Circuit in *United States Telecom Association v. FCC*, 290 F.3d 415 (2002). Arguably, the FCC took such action when its *TRO* became effective October 2, 2003.

² See *In Re: Generic Docket to Establish UNE Prices for Line Sharing per FCC 99-355 and Riser Cable and Terminating Wire as Ordered in TRA Docket No. 98-00123, First Initial Order*, Docket No. 00-00544 ("*First Interim Order*").

carriers ("CLECs"); (2) allow use of such cards by CLECs on nondiscriminatory terms and just and reasonable rates; and (3) perform cost studies for the installation of such line cards in the NGDLC equipment at remote terminal sites.³

BellSouth and Sprint-United have filed appeals from the *First Interim Order*. The appeals were filed in United States District Court, Middle District of Tennessee, Nashville Division on August 26, 2002.⁴ Without repeating all of the grounds for appeal, BellSouth and Sprint-United respectfully submit that the Authority's *First Interim Order* and related orders are fundamentally flawed as a matter of law. As pointed out in previous filings, the FCC has authorized state commissions to establish unbundling and access obligations only where the state complies with the necessary and impair analysis required by Section 251(d)(2) of the 1996 Act.⁵ None of the prior orders, however, even purport to apply the necessary and impair analysis required by law.

For example, in ordering BellSouth and Sprint-United to provide and install dual purpose line cards for NGDLC, the TRA cited generally to 47 U.S.C. § 251(c) of the 1996 Act. No mention was made of the actual section of the 1996 Act that specifically authorizes the FCC to designate what network elements shall be subject to unbundling and access requirements. That section allows for further unbundling of the local telephone company's network but only after considering, "at a minimum, whether - (A) access to such network elements as are proprietary in nature is *necessary*; and (B) the

³ *First Interim Order*, p. 43. The TRA couched its decision in terms of incumbent LECs' line sharing obligation. *Id.* at 42-43. The FCC line sharing rules relied upon by the TRA, however, were vacated one month after the TRA's decision, in *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

⁴ See Docket No. 3-02-0830. Protective appeals were also filed in the Court of Appeals for the Middle Section of Tennessee on the same date. See Docket No. M2002-02054-COA-R12-CN. If the Authority grants the *Motion to Vacate*, BellSouth and Sprint-United will file motions requesting that both Courts dismiss the appeals relating to Issue 20, regarding dual purpose line cards. Additional aspects of the TRA's *First Interim Order* have also been appealed and will remain pending.

⁵ See Section 47 C.F.R. § 51.317.

failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it now seeks to offer."⁶ As a consequence of this failure to even consider the pertinent section of the 1996 Act, by requiring ILECs to provide dual purpose line cards for NGDLC, the Authority has effectively determined that the ILECs must unbundle parts of their packet switching networks without performing the critical impairment analysis required by the federal Act.

In addition to its failure to apply the required "impairment" test, the TRA imposed the requirement to install dual purpose line cards for NGDLC even though the TRA in its Reconsideration Order acknowledged that dual purpose line cards had not been deployed for NGDLC in Tennessee by either Sprint-United or BellSouth and that such technology is not compatible with the ILECs' systems. The Authority further stated that "CLECs are not harmed, however, at this time because BellSouth has not yet deployed this technology in Tennessee."⁷ To the extent that one of the purposes of the TRA's order was to insure that there was "parity" between the CLECs and BellSouth and Sprint-United, clearly such an effort was misplaced and inappropriate. Such a rationale provides no basis for the TRA's order.

In Its TRO, The FCC Conclusively Resolved the Line Card Issue.

During the pendency of the Stays granted by the TRA, the FCC has issued its *Triennial Review Order*. In the *TRO*, the FCC directly addressed the impact of its unbundling requirements on packet switching facilities and functionalities, as well as the electronics and equipment used to transmit packetized information over

⁶ 47 U.S.C. § 251(d)(2) (emphasis added).

⁷ See *Order on Petition for Stay and Requests for Reconsideration and Clarification* in Docket No. 00-00554 at 7.

hybrid loops (*i.e.*, local loops consisting of both copper and fiber optic cable). The FCC has determined, after analysis under the necessary and impair standards mandated by §251 of the federal Act, that ILECs are not required to unbundle their packet switching networks, nor are ILECs required to offer unbundled access to the electronics and equipment -- including xDSL-capable line cards -- used to transmit packetized information on those networks. The FCC definitively resolved this issue on a national basis. Therefore, no state proceedings are necessary beyond the *vacatur* of the TRA dual purpose line card order.

The FCC defined packet switching as the "routing or forwarding [of] packets, frames, cells or other data units based on address or other routing information contained in the packets, frames, cells or other data units' as well as the functions performed by DSLAMs."⁸ In the FCC's *UNE Remand Order*, the FCC excluded packet switching functionalities from the Act's section 251(c)(3) unbundling obligations, except in limited circumstances.⁹

Revisiting the issue in the *Triennial Review*, the FCC confirmed that, "on a national basis ... competitors are not impaired without access to packet switching, including routers and DSLAMS."¹⁰ Dual purpose line cards perform the DSLAM function. Thus, the FCC affirmed its decision in the *UNE Remand Order* not to unbundle packet switching as a stand-alone network element. In addition,

⁸ *TRO*, para. 535.

⁹ See 47 C.F.R. § 51.319(c) (5)). See also *TRO*, para. 535.

¹⁰ *Id.*, para. 537.

however, the FCC found that the limited exceptions to its packet switching exemption described in the UNE Remand Order were "no longer necessary."¹¹

The TRO record, according to the FCC, sufficiently demonstrated that "a wide range of competitors are actively deploying their own packet switches, including routers and DSLAMs, to serve both the enterprise and mass markets, and that these facilities are much cheaper to deploy than circuit switches."¹²

The FCC noted that its decision not to impose any unbundling requirements for packet switching (and to eliminate prior "limited" exceptions to its original exclusion of packet switching from the unbundling requirements), also specifically applied to unbundling of packet switching functionality "as it exists in digital loop carrier (DLC) systems that are deployed in [an ILEC's] loop plant to provide multiplexing, switching, and routing functionalities between customer premises and the central office."¹³ As the FCC explained in an earlier discussion in the *TRO* regarding "hybrid loops"¹⁴ deployed by ILECs as part of next-generation networks for the provision of broadband services:

the rules we adopt herein do not require incumbent LECs to provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops, *such as the xDSL-capable line cards installed in DLC systems* or equipment used to provide passive optical networking (PON) capabilities to the mass market.¹⁵

Further, in support of its determination, the FCC concluded that:

¹¹ *Id.*, para. 537-38.

¹² *Id.*, para. 538.

¹³ *Id.*, para. 540.

¹⁴ *I.e.*, "local loops consisting of both copper and fiber optic cable (and associated electronics, such as DLC systems). *Id.*, para. 288, n. 832.

¹⁵ *Id.*, paras. 288 and 540 n. 1661 (emphasis added).

. . . there do not appear to be any barriers to deployment of packet switches that would cause us to conclude that requesting carriers are impaired with respect to packet switching. We therefore find that the evidence in the record confirms the Commission's findings in the UNE Remand Order that competitors continue to actively deploy their own packet switches, including routers and DSLAMs, and are not impaired without unbundled access to these facilities from incumbents.¹⁶

The FCC's determination and analysis apply to both the enterprise and mass market environments.¹⁷

Finally, the FCC observed in its *TRO* that its conclusions were consistent with other policy objectives in the Act, namely, its goal of promoting technology advancements. "In order to ensure that both incumbent LECs and [CLECs] retain sufficient incentives to invest in and deploy broadband infrastructure, such as packet switches, we find that requiring no unbundling best serves our statutorily-required goal."¹⁸

CONCLUSION

The TRA's *Line Card Order* is flatly inconsistent with the *TRO*. In the *TRO*, the FCC conclusively excluded packet switching from an ILEC's § 251(c)(3) unbundling obligations, and eliminated the limited exceptions previously provided in its Line Sharing Order. ILECs are not required to unbundle packet-switching as a stand-alone UNE, nor are they required to provide unbundled access to the electronics or other equipment used to transmit packetized information over hybrid loops. Such "electronics or other equipment" include "xDSL-capable line cards

¹⁶ *Id.*, para. 539.

¹⁷ *Id.* paras. 537, n. 1645 and 538.

¹⁸ *Id.*, para. 541.

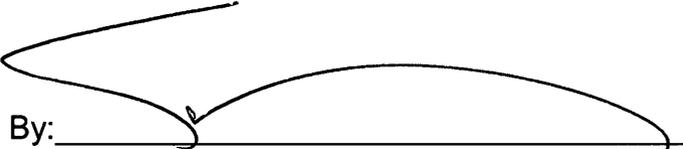
installed in DLC systems," e.g., dual purpose line cards used (or to be used) in the ILECs' NGDLC equipment.

In reaching this decision, the FCC specifically rejected the CLECs' impairment arguments. The FCC definitely resolved this issue on a national basis. Therefore, no state proceeding is necessary beyond the *vacatur* of the *Line Card Order*.

WHEREFORE, BellSouth, the Sprint Companies and Citizens request that the Authority vacate the *Line Card Order*. In the alternative, BellSouth, the Sprint Companies and Citizens request that the Stay be extended indefinitely beyond December 2, 2003 to allow the Authority additional time to consider this *Motion*.

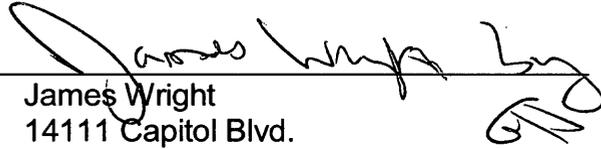
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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2003, a copy of the foregoing document was served on the parties of record, via the method indicated:

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